IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1925.

No. 333.

MA-KING PRODUCTS COMPANY,
Appellant,

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE OF THE UNITED STATES.

BRIEF OF ARGUMENT FOR APPELLANT.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

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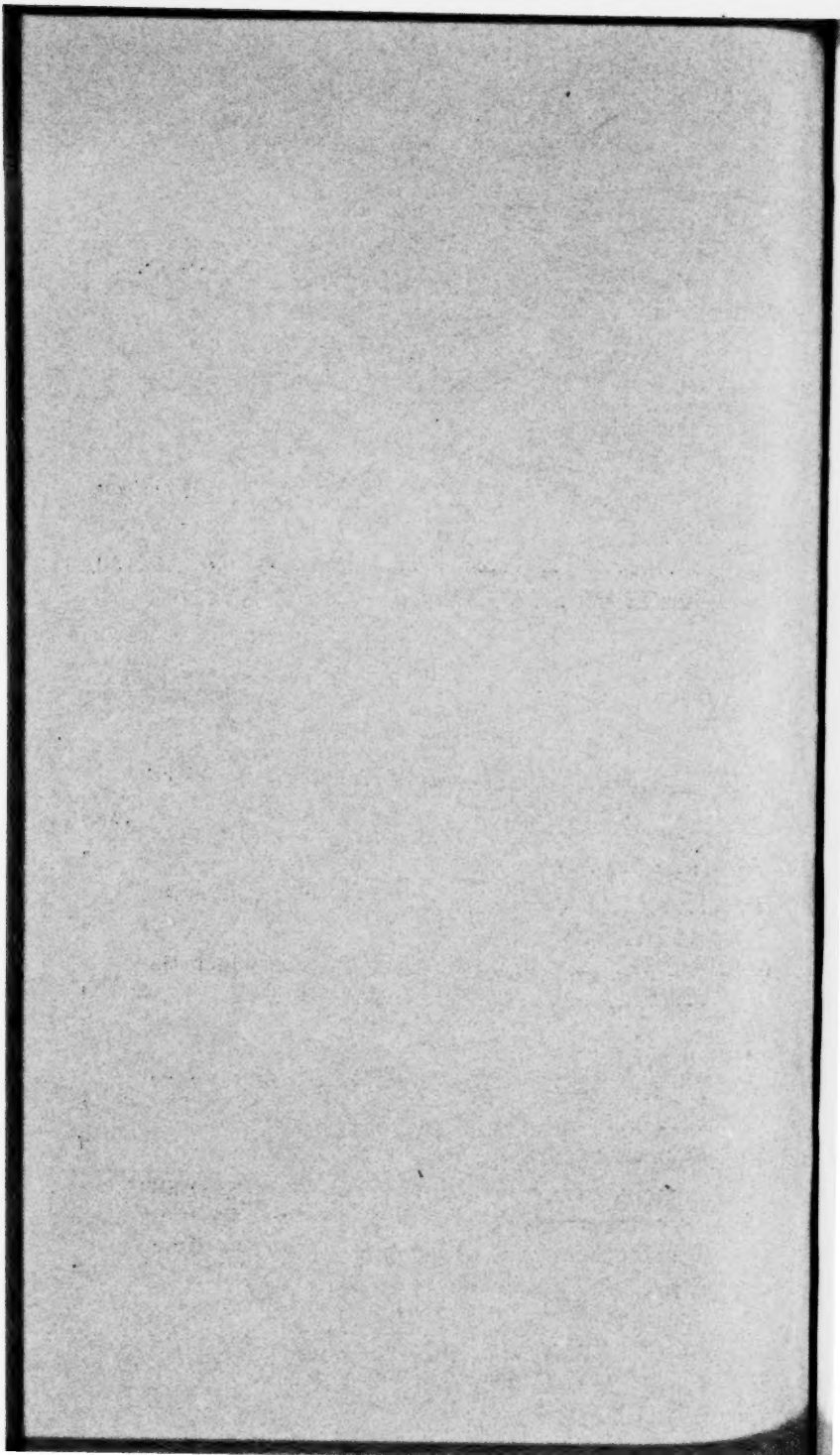

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II. REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED IN THE COURT BELOW.

The Opinion of the United States District Court,—the Court of original jurisdiction, has not been reported. It is to be found, however, in the Record, pp. 25 and 26. The Opinion of the United States Circuit Court of Appeals, affirming the decree of the United States District Court, is reported in 3 Federal Reporter, Second Series, p. 936.

III. A CONCISE STATEMENT OF THE GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Circuit Court of Appeals, affirming the judgment of the United States District Court for the Western District of Pennsylvania, was entered on Feb-

bruary 9, 1925 (R. p. 31), simultaneously with an Opinion handed down by Buffington, Circuit Judge (ibid. pp. 29-31).

In that Opinion, the Court ruled that the granting of a permit for the production of denatured alcohol, under the National Prohibition Act, is purely descretionary with the Commissioner of Internal Revenue (ibid. pp. 30-31). It further ruled that the Commissioner was justified in refusing such permit to the appellant corporation on the sole ground that two of its officers,—real estate operators, served as conveyancers for several building and loan associations, among which was one on whose Board of Directors there were several men suspected, in purely collateral enterprises in no way connected with the appellant, of violations of the Prohibition law (ibid. p. 30).

The appeal from the decree of the United States District Court for the Western District of Pennsylvania, dismissing the complainant's Bill, was accordingly dismissed by the Circuit Court of Appeals, and the finding of the Commissioner was affirmed (ibid. p. 31).

This decision of the United States Circuit Court of Appeals having been rendered on February 9, 1925, before the Act of Congress of February 13, 1925, (43 Stat. L. 936), which amended the Judicial Code, became effective, the present appeal was taken in pursuance of Section 241 of the Judicial Code, enacted March 3, 1911 (36 Stat. L. 1157), which provided:

> "In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

The only cases, in which the judgment or decree of the Circuit Court was made final, are specified in Section 128 of the Judicial Code (36 Stat. L. 1133):

> "* * * * the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

to which, of course, must be added "cases arising under the Bankruptcy Act", made final by Section 4 of the Act of January 28, 1915, ch. 22 (38 Stat. L. 804).

As the proceedings at bar involved none of these excepted or "final" cases, and "the matter in controversy", i. e., the amount at stake, was approximately $35,000.00 (R. p. 6), it follows that, under Section 241 of the Judicial Code, ubi supra, there was "of right an appeal to the Supreme Court of the United States."

IV. A CONCISE STATEMENT OF THE CASE.

The plaintiff-appellant is a New Jersey corporation, authorized and empowered, by the terms of its charter, to engage in the business of making, producing, distilling, distributing and otherwise dealing in alcohol, denatured alcohol and kindred products thereof (paragraphs 1 and 2 of Bill, R. p. 2; and the express admission thereof in the corresponding paragraphs of the Answer, R. p. 4). On October 26th, 1923, it filed with the Collector of Internal Revenue of the 23d District of Pennsylvania, at Pittsburgh, its application for a permit to operate a denaturing plant at No. 925 Bowen Street, Pittsburgh. The application was made in accordance with the laws and regulations in such case made and provided, and was accompanied by a surety bond of $100,000.00, as well as by the requisite and necessary plans and sketches of the plant, its equipment and general layout, erected and established by the plaintiff at

great expense. The Collector was likewise furnished with a copy of the Minutes of the plaintiff corporation, showing the election of its officers and directors, and a copy of a Resolution, duly certified, conferring upon its president the right to apply for such permit and to sign all the necessary papers in connection therewith (Bill, paragraphs 4 and 5, R. pp. 2-3; and express admission thereof in the corresponding paragraphs of the Answer, R. p. 4)

On November 8, 1923, the Collector of Internal Revenue, at Pittsburgh, after due consideration of the application and inspection of the plant, equipment and general layout, duly recommended to David H. Blair, United States Commissioner of Internal Revenue, that plaintiff's application be approved and the permit granted (Bill, paragraph 6, R. p. 3; Answer, paragraph 6, R. p. 4). This the latter official refused to do, and the plaintiff thereupon filed a Bill in Equity in the United States District Court for the Western District of Pennsylvania, setting forth the above facts and averring that the Commissioner's refusal was arbitrary, illegal, unreasonable and unwarranted, and praying that his action be reviewed by the Court and that he be directed to issue the permit applied for (Bill, paragraph 7 and 8 et seq., R. p. 3).

The Commissioner filed his Answer to plaintiff's Bill, expressly admitting all of plaintiff's averments of fact (R. p. 4). He denied, however, that his refusal was arbitrary and unreasonable and, on the contrary, averred that, as a result of an investigation conducted by his agents, he was informed that plaintiff's president and secretary-treasurer were not entitled to be entrusted with a permit under the provisions of the National Prohibition Act. He also denied plaintiff's allegation of having been prejudiced and damaged by the defendant's refusal of the permit (R. p. 4); and the issue thus having been joined, the case proceeded to trial.

Both Mr. Bogash and Mr. Klutsch, the two officers of

the plaintiff mentioned in the defendant's Answer, took the stand and submitted to a searching cross-examination. Nothing, however, of a derogatory character was elicited against them. In fact, the defendant's own witnesses, Leo A. Conner and Andrew A. Quigley, the two prohibition agents who conducted the investigation on behalf of the defendant in connection with plaintiff's application, expressly admitted that they had no complaint to make against either of them, and that their sole objection consisted of the fact that they acted as conveyancers for the Duell Building and Loan Association, (one of a number of such associations by which they were similarly employed), several members of whose Board of Directors had been charged with, (though not convicted of), liquor law violation (R. pp. 23-24; ibid. p. 24). No connection whatever was shown between those men and Messrs. Bogash and Klutsch or the plaintiff corporation, nor was there anything to indicate any active participation or even passive connivance on their part. On the other hand, the uncontradicted testimony of both, Mr. Bogash and Mr. Klutsch, was to the effect that they knew absolutely nothing of those alleged violations (R. pp. 10-11; p. 13), and that their acquaintance with those men was of the most casual and superficial character, and was confined entirely to matters purely collateral, connected solely with the business of the Duell Building and Loan Association, which was usually transacted at its meetings (R. pp. 11-12; p. 14).

The testimony further established that Messrs. Bogash and Klutsch were men of substance and probity, worth approximately $100,000 and $50,000, respectively (R. p. 7; p. 15); that they bore an unimpeachable reputation and were highly recommended in a number of letters sent to and now in possession of the Department (R. p. 12; p. 14); that they have been engaged in the real estate business at Philadelphia since 1916, as co-partners until 1923, and individually ever since (R. pp. 5, 6, 13); and that they have never

committed any violation of law whatsoever (R. p. 6, p. 7, p. 14). The amount already invested in plaintiff's business was shown to be approximately $35,000 (R. p. 6).

The District Court of the United States ruled that the Commissioner of Internal Revenue was vested with a wide discretion in the matter, and that his refusal to issue a permit to the appellant was not an abuse of such discretion. A decree was accordingly entered, dismissing the complainant's Bill (ibid. pp. 25-26), and from this decree an appeal was taken to the Circuit Court of Appeals for the Third Circuit (ibid. pp. 27-28).

The matter was argued in due course in the Circuit Court of Appeals, and resulted in a judgment of affirmation, in an opinion handed down by Buffington, Circuit Judge, on February 9, 1925, (ibid. pp. 29-31). In that Opinion, the learned Circuit Court of Appeals held that the granting or withholding of a permit for the production of denatured alcohol, under the National Prohibition Act, was purely discretionary with the Commissioner of Internal Revenue (ibid. pp. 30-31). It further ruled that the Commissioner was justified in refusing the permit to the appellant corporation because of the employment of its two officers, as conveyancers, by the Duell Building and Loan Association (ibid. p. 30). The present appeal thereupon followed.

V. A SPECIFICATION OF ERRORS ASSIGNED AND INTENDED TO BE URGED.

The learned Circuit Court of Appeals for the Third Circuit erred in dismissing the Appeal in the above-entitled case and in affirming the Judgment and Decree of the District Court of the United States for the Western District of Pennsylvania, from which Judgment and Decree the said Appeal was taken, by entering the following Order and Decree:

"So holding, this appeal is dismissed at appellant's costs, and as the act provides for affirmative action by the Court, the mandate will direct that there be added to the decree below dismissing the bill these words: 'and the finding of the Commissioner is affirmed.'" (R. p. 31).

The said errors are more particularly set forth as follows:

1. The said Circuit Court of Appeals erred in holding and deciding that the mere fact that two officers of the appellant corporation served as conveyancers for several building and loan associations, among which was one which had upon its Board of Directors several men suspected, in matters purely collateral, of violations of the Prohibition law, was sufficient to warrant the refusal of the permit by the Commissioner (R. p. 30).

2. The said Circuit Court of Appeals further erred in holding and deciding that the granting of a permit for the production of denatured alcohol, under the National Prohibition Act, is purely discretionary with the Commissioner of Internal Revenue (ibid. pp. 30-31).

3. The said Circuit Court of Appeals erred in holding and deciding that the Commissioner did not commit an abuse of discretion in refusing the appellant a permit for the production of denatured alcohol (ibid. p. 30).

VI. ARGUMENT.

The position taken by the Commissioner of Internal Revenue—the defendant in these proceedings—was that notwithstanding plaintiff's *conceded compliance* with all the legal requirements, the furnishing of a $100,000.00 bond, and the establishment of a plant and all the necessary equipment, in strict accord with the regulations, all of which

involved an outlay of approximately $35,000 (R. p. 6, Vide also paragraphs 1-6 of Bill, R. pp. 2-3, and the express admissions thereof in the Answer, ibid. p. 4), the plaintiff corporation was not entitled to receive a permit, *solely* because two of its officials, the president and secretary-treasurer, respectively, were acting as conveyancers for several building and loan associations, among which was one named the Duell, on whose Board of Directors there happened to be several men suspected, *in purely collateral enterprises*, of violations of the Prohibition law,—although these men had absolutely no connection with the plaintiff corporation, owned no stock therein, and were in no way interested in its business; and notwithstanding that the *uncontradicted* evidence showed that their acquaintance with the plaintiff's corporate officials was of the most casual character, and was confined entirely to matters purely collateral and connected solely with the business of the Duell Building and Loan Association, transacted during its meetings. This circumstance alone was adjudged by the Commissioner sufficient to condemn those officials,—men of considerable substance, unquestioned probity, and unimpeachable reputation; and to warrant the withholding of the permit applied for by the appellant corporation.

> "Q. Well, then, putting it in a nutshell, excepting for the fact that Mr. Bogash and Mr. Klutsch were connected with the Duell Building and Loan Association, and that these records which you examined disclosed that several officers of that association in collateral enterprises were connected with what you believed to be illegal liquor activities, *you know nothing against Mr. Bogash and Mr. Klutsch at all?*
>
> A. No, sir."
>
> (Testimony of Conner, R. pp. 23-24.)

To the same effect: testimony of Quigley (R. p. 24). The Court below, in sustaining the Commissioner's

ruling, based its conclusion upon the assumption that the latter official was vested with a wide discretion in the matter; and that his refusal of appellant's application, though predicated upon an admittedly remote and unrelated ground, did not constitute an abuse of that discretion. This, it is respectfully submitted, was clearly erroneous. The appellant contends that:

1. *There is no discretion vested by law in the Commissioner in relation to permits for the production of industrial alcohol;*

2. *Even assuming that the power of the Commissioner was discretionary, the refusal of the permit in the case at bar was a distinct abuse of such discretion.*

These two propositions are taken up in the ensuing Argument seriatim.

I.

THE GRANTING OF A PERMIT FOR THE PRODUCTION OF DENATURED ALCOHOL, UNDER THE NATIONAL PROHIBITION ACT, IS NOT A DISCRETIONARY FUNCTION.

1. *The statutory grant of a right of review, and the express mandate to the reviewing Tribunal, to substitute its independent judgment on the facts and the law for that of the Commissioner, negative the existence of discretionary power in the latter official.*

It may be well to advert in limine to the pertinent portions of the National Prohibition Act relating to the subject under consideration. They read as follows:

"Liquor for nonbeverage purposes * * * may be manufactured, purchased, sold, bartered, transported,

conjunction with the preceding Section, grants a right of review of the Commissioner's decision by a Court of Equity, and provides further that "the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant".

Said the learned Circuit Court (R. p. 31):

> "The last phrase "as the facts and law of the case may warrant," shows that Congress meant the Commissioner was to have, not the mere mandatory clerical duty of signing a permit, but the *discretionary* and responsible one of considering facts and law before he determined whether he would permit manufacture. If issue of the permit were mandatory on the Commissioner, why give the Court jurisdiction to "affirm, modify or reverse the finding of the Commissioner as the facts and law of the case may warrant?"
>
> That the Court was empowered to review the "findings of the Commissioner" and was given power to affirm, modify or reverse such finding, shows that what the Commissioner was to do was not the perfunctory signing of a formal permit, but the responsible duty of determining whether this high permissive privilege and permit should be issued to an applicant."

This conclusion, it is respectfully submitted, is clearly a *non-sequitur*. How could it be possibly maintained that, because the Commissioner's action is made reviewable by a Court of Equity, and that Tribunal is expressly directed to decide *in accordance with its own independent judgment as to the facts and the law*, there is an indication of an intention on the part of Congress to invest the Commissioner with a purely discretionary power, or, as the Court below put it, "a wide discretion" in the matter? Is not this very substitution of the judgment of the reviewing Tribunal for that of the Commissioner, utterly incompatible with any theory of discretion in the latter?

"Discretion means the liberty or power of acting *without other control than one's own judgment.*"

Shiras, J., in The Steamship Styria v. Morgan, 186 U. S. 1 (1902), p. 9.

"Discretion" is defined, when applied to public functionaries, to be "a power of right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, *uncontrolled by the judgment or conscience of others.*" Oneida Common Pleas Judges v. People, Savage, 18 Wend. 99. *It perverts and destroys the meaning of the word to hold that exercise of discretion may be reviewed or controlled by some other person or tribunal than the person on whom it is conferred.* * * * In Martin v. Ingham, 38 Kan. 641, Mr. Justice Valentine, in the opinion, says: "No court ever attempts, by either injunction or mandamus, or by any other action or proceeding, to control legislative, judicial, *executive,* or political *discretion;* and never, indeed, attempts to control any purely legislative, judicial, or executive act of any kind, *nor pure discretion of any kind,* except when superior court on appeal reviews a decision of an inferior court; . . . The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus are such acts only as are in their nature *strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform, upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority,* and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."

Smith, J., in Farrelly v. Cole, 60 Kans. 356 (1899).

"While it may be difficult to give a satisfactory definition of the term "judicial discretion," because of

the wide difference of the authorities as to its nature, it may be said to be a discretion that is sound and guided by the fixed principles of law. 6 Enc. Pl. & Pr. 819. But, even in cases calling for the exercise of such discretion, it will not be reviewed except for its manifest abuse. Such is, we believe, the universal rule. Where, however, discretion is vested *in a nonjudicial body,* such as trustees or officers of a corporation, *or other public functionaries,* its exercise does not call for the application of any fixed rules or principles of law, and its meaning cannot be so limited nor restricted, *since to do so would be to take such a discretion away from the body upon which it is conferred and bestow it upon some other body, and so on ad infinitum, so long as the right of appeal or review existed.*"

Morris, J., in Conway vs. Minnesota Ins. Co., 62 Wash. 49 (1911).

"That principle is that the writ of mandamus may issue where the duty, which the court is asked to enforce, is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy; and it *cannot issue* in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment *or discretion.*"

Lamar, J., in United States v. Windom, 137 U. S. 636 (1891).

"The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him *to exercise discretion or judgment.* Nor can it by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. . . . The interference of the courts with the performance

of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

Taney, C. J., in Decatur v. Paulding, 14 Pet. 497 (1840) p. 515.

The above was quoted with approval by Bradley, J., in

United States v. Black, 128 U. S. 40 (1888), and Brewer, J., in

Keim v. United States, 177 U. S. 289 (1900), p. 293.

"There can be no question from the findings in this case that the plaintiff had the benefit of a hearing according to the regulations then in force. The court of claims, in its opinion, stated that the subsequent investigation established his innocence of the charges made against him. But the things required by law and regulations were done, and the *discretion of the authorized officers was exercised as required by law.* It is settled that *in such cases* the action of executive officers *is not subject to revision in the courts.* Keim v. United States, 177 U. S. 290."

Day, J., in Eberlein v. United States, 257 U. S. 83 (1921) p. 84.

Nor does the fact that the Commissioner may be called upon, in the performance of his duty, to interpret and apply the law, necessarily affect the mandatory character thereof, or render it per se discretionary:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, *and he must therefore, in a certain sense, construe it,* in order to form a judgment from its language what duty he is

directed by the statute to perform. *But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one.* If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him and therefore it was not ministerial, and the court would on that account be powerless to give relief."

Peckham, J., in Roberts v. United States, 176 U. S. 221 (1900) p. 231.

It thus follows, it is respectfully submitted, that the statutory provision relating to the right of review by a Court of Equity, and the power committed to that Tribunal to decide *independently* "as the facts and law of the case may warrant", far from supporting the theory of the Commissioner's discretion, is utterly inconsistent therewith, and strongly militates against it.

2. *The exercise of an official function, though permissive in form, is mandatory in charater, if it involves public interests or individual rights.*

It is obvious, it is respectfully submitted, that, in en acting the Volstead Law, Congress intended not only to ban intoxicating liquor as a beverage but also to regulate and *promote* the production of alcohol for industrial purposes,—a business not only lawful but expressly recognized

as beneficial to the community, and one which, in the interest of the public, ought to be fostered and encouraged; and it was with this *dual* end in view that the National Prohibition Act was framed. This appears not only from the title of the Statute which reads, "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, *and to INSURE AN AMPLE SUPPLY of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries,*" but from the very text of the Act which provides for the promulgation of appropriate regulations (Title III, Section 13) "respecting the establishment, bonding, and operation of industrial alcohol plants, *denaturing plants,* and bonded warehouses" * * * * to secure revenue, prevent diversion, "and to place the non-beverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the *highest possible plane* of scientific and commercial efficiency consistent with the interests of the Government, and *which shall insure an ample supply of such alcohol and promote its use* in scientific research and the development of fuels, dyes, and other lawful products".

Congress having thus stamped the production of non-beverage alcohol as a quasi public utility,—an industry in the promotion of which the community is directly interested, it necessarily follows that the provisions relating to the issuance of permits for the operation thereof—all of which have been quoted above, even though only *permissive* in form, are nevertheless, under the uniformly recognized rules of statutory construction, mandatory in character; and that the function of the Commissioner of Internal Revenue, in issuing such permits, is not discretional, but obligatory.

This principle has been enunciated and uniformly adhered to by all our courts in an unbroken line of English, Federal and State authorities.

Thus, in

Mason v. Fearson, 50 U. S. 248 (1850),

Mr. Justice Woodbury said (p. 259):

"Whenever it is provided that a corporation or officer 'may' act in a certain way, or 'it shall be lawful' for them to act in a certain way, *it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons.*

Thus in Rex and Regina v. Barlow, 2 Salkeld 609, 'Where a statute directs the doing of a thing for the sake of justice *or the public good*, the word "may" is the same as the word "shall"; thus 23 Henry VI says the sheriff may take bail; this is construed he shall, for he is compellable so to do.' Carthew, 293.

On this see further The King v. The Inhabitants of Derby, (Skinner, 370); Blackwell's Case, 1 Vernon, 152-154; 2 Chitty, 251; Dwarris on Stat. 712; Newburg T. Co. v. Miller, 5 Johnson Ch. 113; City of New York v. Furze, 3 Hill 612; Minor v. Mechanics Bank, 1 Pet. 64. Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer *is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do.* The power is conferred for their benefit, not his; and the intent of the Legislature, which is the test in these cases, seems under such circumstances to have been 'to impose a positive and absolute duty.' But under other circumstances, where the act to be done *affects no third person, and it is not clearly beneficial to them or the public*, the words 'may' do an act, or 'it is lawful' to do it, do not mean 'must' but rather indicate an intent in the Legislature to confer a *discretionary* power. Malcolm v. Rogers, 5 Cowen 88; 1 Peters 64; 5 Johns. Ch. 113."

In

Supervisors of Rock Island County v. U. S., 71 U. S. 435 (1866),

Swayne, J., said (pp. 445-6):

"The counsel for the respondent insists, with zeal and ability, that the authority thus given (to levy a special tax) involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the *discretion* with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language *'may, if deemed advisable'* which accompanies the grant of power and, as he contends, qualifies it to the extent assumed in his argument.

In King v. Inhab. of Derby, Skin. 370, there was an indictment against 'divers inhabitants' for refusing to meet and make a rate to pay 'the constable's tax'. The defendants moved to quash the indictment 'because they are not compellable, but the statute only says that they *may*, so that they have their *election*, and no coercion shall be.' The Court held that 'may' in the case of a public officer, is tantamount to 'shall', and if he does not do it, he shall be punished upon an information, and though *he may be commanded by a writ*, this is but an aggravation of his contempt."

In Rex and Regina v. Barlow, 2 Salk. 609, there was an indictment upon the same statute, and the same objection was taken. The Court said, 'When a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall". Thus 23 Hen. VI says "the sheriff may take bail." This is construed he shall, for he is compellable to do so.'

These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. *The rule they lay down is the settled law in both countries.* In Mayor of N. Y. v. Furze, 3 Hill 614, and Mason v. Fearson, 9 How. 248, the words "it shall be lawful" were held also to be mandatory. See Atty. Gen. v. Lock, 3 Atk. 164; Blackwell's Case, 1 Vern. 152; Dwar. Stat. 712; Malcolm v. Rogers, 5 Cow. 188; Newburg T. Co. v. Miller, 5 Johns. Ch. 113; Js. Clark County v. T. Co., 11 B. Mon. 143; Minor v. Bank, 1 Pet. 64; Com. v. Johnson, 2 Binn. 275; Virginia v. Justices, 2 Va. Cas. 9; Ohio v. Chase, 5 Ohio 53; Coy v. Lyons, 17 Ia. 1.

The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, *or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is, in fact, peremptory.* What they are empowered to do for a *third person* the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless.

In all such cases it is held that the intent of the Legislature, which is the test, *was not to devolve a mere discretion, but to impose "a positive and absolute duty."*

In Maryland v. Miller, 194 Fed. 775 (1911), Waddill, J., speaking for the Circuit Court of Appeals of the Fourth Circuit, said (p. 781):

"From the language of the legislative act, there can be no less doubt of the duty imposed on the city than of the consequences of its failure to perform the

same. The meaning of language similar to that used in the act was passed upon by the Supreme Court of Maryland in the case of Baltimore v. Marriott, 9 Md. 160, in construing a provision of the then charter of the city. There the provision was to the effect that the city of Baltimore should have *'full power and authority'* to pass all laws and ordinances necessary to preserve the health of the city, and to prevent and remove nuisances etc., and the court held that *when the statute conferred power upon the corporation, to be exercised for the public good, the exercise of the power was not merely discretionary but imperative, and that the words 'power' and 'authority' meant duty and obligation."*

In

Chase v. U. S. 256 U. S. 1, (1921),

Mr. Justice McKenna, in construing the Act of Congress of 1912, by which the Secretary of the Interior was "authorized" to survey, appraise and sell certain unallotted lands on the Omaha Indian reservation, said (pp. 8-9):

"Appellant's contention is that the act is neither directory nor mandatory; it is *permissive only* and has been, it is said, so construed by the secretary. There are cases, however, that decide that an officer 'authorized' is an officer *commanded in a matter of public concern."*

Citing:

Arundel County v. Duckett, 20 Md. 468;
Flynn v. Canton Co., 40 Md. 312;
Magaha v. Hagerstown, 95 Md. 62;
Rankin v. Buckman, 9 Or. 253;
Maryland v. Miller, 194 Fed. 775;
U. S. v. Cornell Co., 137 Fed. 455.

Nor is this principle confined to Federal adjudications. The highest tribunals of the different States have repeatedly and consistently adhered to it. Thus, in addition to the numerous State authorities cited in the Opinions excerpted above, an endless array of decisions throughout the Union could be readily marshaled to sustain and vindicate the soundness of this proposition. Only a few of them, culled at random, are here presented.

In

> People v. Commissioners of Highways, 130 Ill. 482 (1889),

plaintiff filed a petition for a mandamus to compel the commissioners to remove a fence which obstructed the highway, under Section 71 of the Act of 1883, which provided "that the commissioners after having given reasonable notice * * * *may* remove any such fence or other obstruction etc." Respondents contended that, under the language of that Act, their duty was *discretionary* and not obligatory and that no mandamus could issue. The lower Court so ruled. On appeal, however, to the Supreme Court, the judgment was reversed.

Said Baker, J.:

> "It is urged that as the Commissioners have charge of the roads in their town, they have a *discretion* in respect to the matter of their management and that the courts will not coerce them by mandamus in regard to matters under their control and left to their *discretion.* Many of the powers given to the Commissioners are discretionary, but, in our opinion, the power here in question *is not of that character.*"

The learned justice, after quoting the statute, goes on to say:

> "We think it was intended by the statute to im-

pose upon the Commissioners the imperative duty of removing obstructions from the public highway *and that the word 'may' is to be construed as 'shall'*. The word 'may' in a statute will be construed to mean 'shall' *whenever the rights of the public or of third persons* depend upon the exercise of the power or the performance of the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or a public duty is imposed upon public officers and the public or *third persons* have a claim de jure that the power shall be exercised." (Citing authorities).

To the same effect:

People v. Brooklyn, 22 Barb. 404;
Kellogg v. Page, 44 Vt. 356;
Monmouth v. Leeds, 76 Me. 28;
Steines v. Franklin County, 48 Mo. 167;
Re Banks, 28 Ala. 28;
Johnston v. Pate, 95 N. C. 68;
Mitchell v. Duncan, 7 Fla. 13;
Kennelly v. Jersey City, 57 N. J. L. 293 (1894);
Stowe v. Kearney, 72 N. J. L. 106 (1905).

As both, the plaintiff as well as the public, are directly concerned in the Commissioner's exercise of the power committed to him under Title III,—the former as a result of its heavy investment, the latter by virtue of its interest (expressly recognized by Congress) in having an "ample supply" of alcohol for scientific and industrial purposes,—it must inevitably follow, under the above authorities, that the Commissioner's function in this respect is mandatory and not merely optional, and that he is vested with no discretion in the matter.

3. *Title III, Section 15, of the National Prohibition Act, clearly indicates absence of discretionary power in the Commissioner.*

Even disregarding the principle of statutory construction just invoked, *and looking solely to the text of the Act itself* for guidance, it is manifest that Congress never intended to confer upon the Commissioner a *purely discretionary power* to refuse permits applied for under Title III. This clearly appears from the provision embodied in Section 15 of that Title, which reads:

> "*It shall be lawful* for the commissioner in all cases of second or cognate offense *to refuse* to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation." (41 Stat. L. 321).

The legislative intent to confine the Commissioner's discretion in refusing a permit *to the situation here specifically designated* is thus obvious; otherwise, why single out a particular instance? In other words, if Congress intended to invest the Commissioner with discretion to refuse permits in *all* cases embraced within Title III, the express provision to that effect with regard to "second or cognate offense" becomes not only unnecessary but utterly meaningless. Surely, the maxim: "Expressio unius est exclusio alterius" is clearly applicable.

In the recent case of

> Michaelson vs. United States, 266 U. S. 42 (1924), Sutherland, J.,

the question arose whether, under the Clayton Act of October 15, 1914; 38 Stat. L. 738, the provision for a jury trial was mandatory or merely permissive. The language of the Judiciary Committee, in reporting the Bill to the House, was invoked as a guide for the ascertainment of the intent of Congress on that point.

It is respectfully submitted, if the extra-legislative language of the Committee's Report is to be taken as an indication of the legislative intent, how much more must this apply to a specific and integral portion of the Statute which clearly indicates the mandatory character of the Commissioner's duties thereunder.

In view of all the above, it is respectfully submitted, the conclusion is inevitable that the Commissioner's functions, under the National Prohibition Act, in cases other than those covered by Title III, Section 15, are mandatory and not discretionary; and that his refusal to exercise them, unless based upon a ground *recognized and sanctioned by law*, constitutes a proper subject for judicial animadversion.

II.

ASSUMING THAT THE COMMISSIONER OF INTERNAL REVENUE IS VESTED WITH DISCRETION, HIS REFUSAL OF THE PERMIT IN THE CASE AT BAR WAS UNWARRANTED, AND A DISTINCT ABUSE OF SUCH DISCRETION.

It is but too obvious, it is respectfully submitted, to require extensive argument that "discretion" is not synonymous with arbitrary power, and that an officer invested with authority to issue permits for a legitimate, though regulated business, must exercise his function fairly and justly. In other words, his action, even if discretionary, must be predicated upon sound reason,—*properly related to the subject matter*, and may not proceed from arbitrary whim or mere personal inclination. Our books are full of cases where legislation, which offended in that respect, was condemned by the courts as repugnant to our American institutions and violative of the constitutional guarantees of life, liberty, pursuit of happiness and due process of law.

Thus, in the leading case of

Yick Wo v. Hopkins, 118 U. S. 356 (1886),

an ordinance of the City of San Francisco provided that no person should engage in the laundry business "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or of stone." This Court adjudged the ordinance invalid on the ground that it conferred "arbitrary power upon the board to give or withhold consent." Said Matthews, J. (pp. 369-70):

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the *play and action of purely personal and arbitrary power.* Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. *But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions,* are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language

of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, *or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*"

In Ex parte Whitwell, 98 Cal. 73 (1893), the petitioner was arrested on the charge of maintaining a hospital for the treatment of insane persons without having procured a license as provided by an ordinance. The ordinance in question prescribed the form of the application, the accompaniment thereof by an architect's diagram of the building, the giving of notice thereof and the hearing to be had thereon. It further provided against treating male and female patients in the same building, and prescribed the character of the structure. The petitioner thereupon sued out a writ of habeas corpus and contended that the latter provisions were *unreasonable* and in violation of his constitutional rights to prosecute a lawful business.

DeHaven, J., while conceding that the business under consideration was properly subject to regulations under the police power, nevertheless adjudged the particular provisions of the ordinance unreasonable and invalid, and discharged the petitioner.

Said he:

"The police power—to make laws to secure the comfort, convenience, peace and health of the community—is an extensive one, and in its exercise *a very wide discretion as to what is needful or proper for that purpose is necessarily committed to the legislative body in which the power to make such laws is vested.* Ex parte Tuttle, 91 Cal. 589. But it is not true, that, when such power is exerted for the purpose of regu-

lating a useful business or occupation, the Legislature is the exclusive judge as to what is a *reasonable and just restraint upon the constitutianal right of the citizen* to pursue any trade, business or profession which in itself is recognized as innocent and useful to the community. *As the right of the citizen to engage in such a business, or follow such a profession, is protected by the Constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power.* Tiedman, Pol. Powers, Sect. 85,194. State v. Jersey City, 47 N. J. L. 286; Com. v. Robertson, 5 Cush. 438; Austin v. Murray, 16 Pick. 121. This principle is stated very forcibly in the case of Mugler v. Kansas, 123 U. S. 661, in the following language:

'The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, the public morals, or the public safety *has no real or substantial relation to those objects,* or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution.' * * * *

In our opinion the ordinance now under consideration imposes *arbitrary and wholly unnecessary conditions* upon the right to maintain such an asylum at that which petitioner alleges he is now conducting,—an asylum in which only those afflicted with mild forms of insanity and the other diseases named in the ordinance are treated. While it is doubtless true that the board of supervisors of a county have the power, in the absence of any general legislation upon the subject, to

prescribe by ordinance proper regulations for the protection of the patients in such an asylum from the danger which might result to them from the destruction of the asylum building by fire, still the requirement that such hospital or asylum shall be maintained only in a building constructed of either brick and iron, or iron and stone, without any reference to the size of such building, or the number of patients it is designed to accommodate therein, and without regard to other safeguards against fire with which it may be provided, is clearly unreasonable."

In

Seattle v. Dencker, 58 Wash. 501 (1910),

Dunbar, J., after conceding the power of a municipality to regulate certain businesses by requiring licenses and imposing a reasonable tax thereon, goes on to say:

"This determination, however, must not be exercised *arbitrarily* or fraudulently, and, while the policy of the enactment may not be questioned by the courts, the *discretion exercised by the law-making power must be natural and reasonable,* and consistent with the general principles of law and the fundamental principles upon which our government is founded. When these principles are violated to the extent of depriving the citizen of natural or *constitutional* rights it is the duty of the court to intervene in his behalf."

In

Bonnett v. Vallier, 136 Wis. 193 (1908),

Mr. Justice Marshall, in discussing the regulation enacted by the Legislature of Wisconsin in respect to tenement and boarding houses, said:

"There must be *reasonable* ground for the police interference, and also the *means adopted must be rea-*

sonably necessary for the accomplishment of the purpose in view. So, in all cases where the interference *affects property and goes beyond what is reasonable by way of interfering with private rights,* it offends against the general equality clause of the Constitution; it offends against the spirit of the whole instrument; it offends against the prohibitions against taking property without due process of law; and against taking private property for public use without first rendering just compensation therefor."

Again, further down:

"It is said 'that an attempt to give a specific meaning to the word "reasonable" is "trying to count what is not number, and measure what is not space" '. Altschuler v. Coburn, 38 Neb. 881-890. It is not synonymous with 'expediency.' Matters of that sort are wholly for legislative cognizance. As applied to means to a legitimate end, it suggests not necessarily the best or the only method, but one fairly appropriate, at least under all the circumstances. In the ultimate, the scope of the term as regards any situation must be measured *having regard to the fundamental principles of human liberty, as they were understood at the time of the formation of the Constitution and were intended to be impregnably entrenched thereby, adapting the same, of course, to our modern conditions. Those principles have not changed in the years that have elapsed since the Constitution was formed.* They are unchangeable, and are of no less, but rather of greater, importance than they were when the framers of the Constitution attempted so carefully to guard them.

Reasonable as applied to a law is manifestly not what *extremists* upon the one side or the other would deem, in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what 'from

the calm sea level', so to speak, *of common sense, applied to the whole situation,* is not illegitimate in view of the end to be attained. In determining that the Court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be said to judicially know because of their common nature or otherwise."

There are numerous cases in Pennsylvania where the Courts of Quarter Sessions, *though specifically vested by law with discretion* to grant or withhold liquor licenses, were reversed by our appellate tribunals because the refusal was predicated upon grounds *unrelated to the conditions required by the statute,* or proceeded from a purely *personal* view of the situation. Thus a refusal because the applicant "made a promise last year not to apply for a license this year," a refusal of a distiller's license on the ground that there was no necessity for it, and a refusal to grant a license on the ground that the former proprietor of the place, for which a license was asked, was guilty of infractions of the law, were denounced by our Supreme and Superior Courts as "arbitrary" and as a distinct "abuse of discretion."

Donoghue's License, 5 Pa. Super. Ct. 1 (1897);
Doylestown Distilling Co.'s Appeal, 41 W. N. C. 313 (1897);
Gemas's License, 169 Pa. 43 (1895);
Doberneck's Appeal, 1 Pa. Super. Ct. 99 (1896).

Said Smith, J., in Donoghue's License, ubi supra, p. 10:

"As to the nature and scope of the *discretion committed to the license court, it is not an arbitrary but a judicial discretion.* 'In the cases in which our license legislation has been considered there is a concurrence of opinion that the discretion which the court of quarter

sessions has in passing upon applications for license is judicial in its nature, and should be exercised with due regard to the petitions and evidence in each case. *An arbitrary refusal to thus exercise it frustrates the legislative purpose, and disregards the plain duty laid upon the court by the law makers.* A decree founded on such refusal ought therefore to be set aside': Kelminski's License, supra, McCollum, J. * * * * * It does not extend to the granting of a license when the case falls short of the statutory requirements, nor, on the other hand, to the refusal of a license *for reasons wholly unrelated to the conditions fixed by the statute,* when these have been complied with by the applicant."

Again, further down (ibid. p. 15):

"But when reasons are set out as the basis of the decision they must be of a *character recognized in law as valid, such as the lack of any of the requisites prescribed by statute to entitle the applicant to a license.* The absence of any of these is to be determined by the license judge from the evidence, or from his own knowledge, and we cannot review his conclusions of fact in the premises. He is to decide the application upon his knowledge or judgment as to the existence or non-existence of the conditions fixed by the legislature. When he does this, he exercises a judicial discretion; *when he acts on reasons having no relation to these conditions, he exercises an arbitrary discretion.*"

Bearing the principle thus adduced in mind, it becomes pertinent to inquire into the facts involved in the case at bar. While a summary thereof was presented above, it may be well to briefly recapitulate them here:

The sole issue raised by the pleadings,—the complainant's Bill and the Commissioner's Answer thereto, was whether the two officers of the complainant corporation,

Messrs. Bogash and Klutsch, were entitled to be entrusted with the desired permit. At the trial in the United States District Court for the Western District of Pennsylvania, the defendant's own witnesses, Leo A. Conner and Andrew A. Quigley, the two prohibition agents who conducted the investigation on behalf of the Commissioner in connection with the plaintiff's application, were forced to admit that they had no ground for complaint against either of these two gentlemen.

> "Q. Well, then, putting it in a nutshell, excepting for the fact that Mr. Bogash and Mr. Klutsch were connected with the Duell Building and Loan Association, and that these records which you examined disclosed that several officers of that association in *collateral enterprises* were connected with what you believed to be illegal liquor activities, *you know nothing against Mr. Bogash and Mr. Klutsch at all?*
>
> A. No, sir." (Testimony of Conner, R. pp. 23-24).
>
> "Q. You heard the testimony of Mr. Conner. For the purpose of brevity, would your testimony support the statements and averments he has made here under oath?
>
> A. *I would say that it would.*" (Testimony of Quigley, ibid. p. 24).

It further appeared from the *uncontradicted* evidence, that both, Mr. Bogash and Mr. Klutsch, were men of substance and probity, bearing an unimpeachable reputation and enjoying the esteem and respect of the community,—the latter fact being evidenced by a number of letters of recommendation sent to and now in possession of the Department (R. p. 12; p. 14); that they have been engaged in the real estate business at Philadelphia since 1916—as copartners until 1923, and individually ever since (R. pp. 5, 6, 13), and that neither of them has ever committed any violation of law (R. pp. 6, 7, 14).

The only objection that the defendant could conjure up against them, *after a protracted investigation by the Government agents,* was that they were acting as conveyancers for Duell Building and Loan Association,—one of a *number* of such associations by which they were similarly employed,—and that on the Board of that Association there happened to be several men who were suspected, *in purely collateral enterprises,* of infractions of the Prohibition Law. No connection, however, was established between those men and Messrs. Bogash and Klutsch, nor was there anything to indicate either active participation or passive connivance on their part. As a matter of fact, their *uncontradicted* testimony was to the effect that they knew absolutely nothing of those alleged violations (R. pp. 10-11; p. 13), and that their acquaintance with those men was of the most casual character, confined entirely to matters purely collateral, and relating solely to the business of the Duell Building and Loan Association, which was usually transacted at its meetings (R. pp. 11-12; p. 14). On this remote and intangible ground, the Commissioner predicated his apprehension of the ultimate abuse of the permit by the plaintiff, and his consequent refusal thereof.

Assuming for the sake of argument that the Commissioner, in the exercise of his discretion,—if discretion he has,—may refuse a permit upon a *well founded* apprehension of its future abuse, was his apprehension well founded in the case at bar? Was the ground upon which it was based, viewed "from the calm sea level of common sense, applied to the whole situation',—to quote the words of Marshall, J., in Bonnett v. Vallier, ubi supra—"*reasonable*" and "reasonably necessary for the accomplishment of the purpose in view"? Did it constitute "a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business or profession which in itself is recognized as innocent and useful to the community"?

Surely, to penalize a citizen simply because he happened to come into *casual* contact with a person who violated the law, in a *transaction distinctly collateral and totally unrelated to him*, and to deprive him, *on such ground*, of his constitutional right to "life, liberty, and the pursuit of happiness" is "to leave room for the play and action of purely personal and arbitrary power" and "is a palpable invasion of rights secured by the fundamental law." Surely, any lawyer, or, for that matter, any Judge on the Bench, however impeccable his conduct and lofty his ethical standard, would be equally banned by reason of his purely *professional* relations with law violators. He would be branded, by the same token, as a person unfit to be entrusted with a permit or to enjoy the confidence of the community. Surely, to state such a proposition, is to refute it!

Moreover, it is obvious that Congress never intended to make *a mere apprehended future violation,* unsupported by actual infractions already committed, a valid reason for withholding a permit. The Statute certainly does not say so, either expressly or by implication, as all the provisions in the Volstead Act along that line, relate *solely* to cases where the violation is an accomplished fact and not *a mere remote future possibility;* and, even in such cases, the refusal is limited to a period of one year only (vide Title II, Section 6,—41 Stat. L. 310; Title III, Section 15,—41 Stat. L. 321). The refusal of the permit in the case at bar was thus clearly predicated upon a ground uncontemplated by law, and entirely beyond the scope of the Commissioner's consideration. In other words,—to paraphrase the language of Smith, J., in Donoghue's License, ubi supra, "having acted on reasons which have no relation to the conditions fixed by the Statute, he exercised an arbitrary discretion", or, as it is more commonly designated, an abuse of discretion.

> "He (the street commissioner) has a right to refuse to grant the license asked for if, in the proper exercise of

his judgment and official *discretion,* he decides that it ought not to be granted; *but he has not the right to refuse it merely for a reason which lies outside the scope of his duty.* Similar questions have often arisen in other jurisdictions; and, so far as we are aware, this doctrine always has been maintained. Missouri ex rel. Laclede Gaslight Co. vs. Murphy, 170 U. S. 78; Re Refusal of License, 72 N. Y. S. R. 822; People ex rel. v. Herkimer County, 56 Barb. 452; People v. Perry, 13 Barb. 206; State v. Warren County, 17 Ohio 558; Zanone v. Mound City, 103 Ill. 552; Gulick v. New, 14 Ind. 93; Harwood v. Quinby, 44 Iowa, 385; Mobile v. Cleveland, 76 Ala. 321; State v. Lutz, 136 Mo. 633; State v. Shannon, 133 Mo. 139; State v. Barnes, 25 Fla. 298; Stockton v. Stockton, 51 Cal. 328; Thomas v. Armstrong, 7 Cal. 286; Reg. v. Fawcett, 11 Cox, C. C. 305; King v. Cumberland Justices, 4 Ad. & El. 695."

Sheldon, J., in French v. Jones, 191 Mass. 522 (1906).

See also Editorial Note to that case in 7 L. R. A., N. S., pp. 525-531.

A situation much stronger than the one presented in the case at bar arose in

United States v. Freund, 290 Fed. 411 (1923).

The defendant in that case, a physician, was indicted for having violated the supplementary provisions of the Volstead Act which prohibit the issuance of more than one hundred prescriptions in any period of ninety days, and limit the dosage prescribed to one-half pint of alcohol for use by any person within a period of ten days. He interposed a Demurrer, and was sustained by the Court, on the ground that these provisions were *unreasonable* and therefore violative of the defendant's constitutional rights.

Said Bourquin, J., (ibid. p. 414):

"It is an *extravagant and unreasonable* attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice. It may be that, even as legislation for reasons of health can compel vaccination, it might in like behalf extend prohibition to alcohol for therapeutical uses. But, so long as legislation tolerates or sanctions such uses of alcohol, the duty and judgment of the physician, the necessity and welfare of the patient, and the right of both, cannot be subjected to *arbitrary and unreasonable legislative interference, dictation, and infringement, like the statutory provision last aforesaid.*

The physician, with power to begin a course of treatment, must have like power to finish it. His judgment to begin must be unrestricted to conduct and finish. Otherwise may be dangers greater than involved by denial of any power, for the latter might be compensated by substitutes. These statutory provisions to restrain the judgment of physicians in exercise of power to prescribe alcohol deprive physicians and patients of *liberty without due process of law, within the meaning of the Fifth Amendment, and are unconstitutional.*"

It is obvious, it is respectfully submitted, if the action of the permittee himself, subject as it is, of course, to his own control and volition, may not be restrained by unreasonable limitations and restrictions, how much more must this be the case when applied to the actions of persons who are total strangers to the applicant, and over whose con-

duct the latter has absolutely no control! How can the law possibly undertake to deprive the plaintiff in the case at bar of its property rights (and it may be well to bear in mind that there is an actual investment of approximately $35,000 at stake), simply because its corporate officers had some collateral business transactions with men accused of violations of the Prohibtion Law, if those violations in no way related to the business of the applicant and the latter is totally unconcerned therein? Surely, the action of the Commissioner in refusing the permit in the case at bar was manifestly less defensible than the attitude taken by the Government in the case last cited. It clearly constitutes an "arbitrary and unreasonable interference, dictation, and infringement", and a deprivation of the applicant's "liberty without due process of law, within the meaning of the Fifth Amendment."

Under these circumstances, it is respectfully submitted, the duty of the Court is manifest. As was said by Associate Justice Harlan, in Mugler v. Kansas, 123 U. S. 623, p. 661: "if a statute (and a fortiori a mere regulation or ruling of the Commissioner) purporting to have been enacted to protect the public health, the public morals, or the public safety *has no real or substantial relation to those objects,* or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

In view of all the above, it follows that the Court below erred in dismissing the plaintiff's appeal and that a reversal of that Decree ought to be awarded.

Respectfully submitted,

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